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ABSTRACT

Legal issues at the state and constitutional levels and associated misconceptions related to written preemployment integrity tests are addressed. Common misconceptions include the beliefs that: (1) such tests fall within the purview of state antipolygraph statutes; (2) unfair discrimination doctrines are violated by integrity testing; and (3) integrity tests constitute an invasion of individual privacy. Although there are legal and legislative reasons for exercising caution when using preemployment integrity tests, there are also countervailing trends that indicate that such tests should be used more extensively. One of these trends is the expansion of the doctrine of negligent hiring; at least 39 states recognize some form of this common law tort. Relevant to psychological testing, plaintiffs have alleged that an employer should have been aware of the characteristics of an employee causing harm. Although no court has specifically stated that psychological testing is necessary to discharge an employer's duty, in many cases such testing would be probative in ascertaining whether an employer has fulfilled his or her duty. Cases illustrating misconceptions about integrity testing and the probative use of integrity testing are provided. (TJH)

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Legal Issues in Integrity Testing

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In recent years there has been a rising interest in the topic of written integrity tests. Much of such interest is due to the public policy and legal issues encompassing integrity testing. It is the purpose of this paper to address some of these issues and their associated common misconceptions, while identifying countervailing legal reasons arguing for the value of integrity testing.

A common misconception regarding integrity tests is that they fall within the purview of state antipolygraph statutes.[1] To the contrary, as indicated by their operative language, many of these statutes are merely proscriptions against the evaluation of applicant or employee "truthfulness" or "deception." Given that integrity tests are not designed to detect lying, they are not affected by these statues. Rather, like most personnel selection tests, they are validated and used only to predict future job behavior. Assertions that integrity tests are somehow similar or equivalent to lie detectors or truth evaluators stem from a basic misunderstanding of how these tests work.

Many other polygraph statutes include language similar to the Minnesota statute which states that "no employer or agent thereof shall. . .require a polygraph, voice stress analysis, or any test purporting to test honesty."[2] Since rules of legal construction require words of general description to be

interpreted in a way that is consistent with specific words, statutory language such as "any test" or "other similar tests" would be interpreted to mean only instruments closely related to those previously listed.

Following this traditional approach to construction, the Minnesota Supreme Court held in State v. Century Camera Inc.[3] that the "two techniques enumerated in section 181.75, the polygraph and the voice stress analysis, both purport to measure physiological changes. Accordingly, we construe any test purporting to test honesty to be limited to those tests and procedures which similarly purport to measure physiological changes."

A number of administrative agencies have also determined that their states' lie detector statutes do not apply to written integrity tests. In a 1983 case, for instance, the Wisconsin Equal Rights Division held that the Wisconsin lie detector act "does not apply to written psychological tests such as the Reid Report."[4] There is no compelling reason to believe that similar statutes would be construed differently.

In sum, the most reasonable conclusion based on consistent legal precedent and statutory interpretation is that Massachusetts[5] and Rhode Island[6] alone restrict the use of integrity testing. Rhode Island's limitation, moreover, specifies only that such tests may not constitute the "primary basis" of an employment decision.

Turning to the legal issue of unfair discrimination, very few selection techniques can match the sheer volume of statistical evidence demonstrating freedom from disparate impact achieved by valid integrity tests. Neither the Equal Employment Opportunity Commission nor any state administrative agency has ever determined that such tests create disparate impact. Although the record shows relatively few challenges for the millions of tests that have been administered, these tests have withstood at least 30 formal challenges. Thus, the evidence demonstrates that integrity tests ensure that applicants are not subjected to discriminatory evaluation, while insulating employers against successful charges of this nature.

Another issue of growing concern for preemployment testing is that of privacy. The exponential growth of such litigation is reflected by a recent report from the Bureau of National Affairs:[7]

> In workplace privacy cases, the nationwide average jury verdict award from 1985 to 1987 was $316,000. From 1979 to 1980, no such cases were heard.

Invasion of privacy claims can be based on a number of sources -- the U.S. Constitution, state constitutions, state laws, and common law torts. Although the U.S. Constitution and most state constitutions protect parties only against

governmental invasions of privacy, the common law and state law are generally applicable to the private employer. With many states recognizing a common law right to privacy and with various new legislative initiatives, even private sector employers can expect to defend against a growing number of such cases.

Nothwithstanding rising privacy litigation, such causes of action have generally focused on drug testing, not psychological testing. Only once has preemployment psychological test use been the subject of a privacy challenge. In Soroka v. Dayton-Hudson[8], plaintiff Soroka had applied for a security guard position with Target Stores, and as a condition of employment was required to complete an inventory consisting of the MMPI and CPI. Soroka alleges that the tests' questions probed into his private thoughts and innermost feelings, and was not job related. He is claiming, inter alia, invasion of privacy under Article 1, Section 1 of the California Constitution[9], as well as under the California common law.

Given that the MMPI-CPI inventory deals with highly personal topics like religion, bodily functions and political beliefs, there is support for the argument that the tests are intrusive -- one consideration in evaluating an invasion of privacy cause of action. On the other hand, Dayton-Hudson appears to have a compelling argument as to the business necessity of assuring that employees placed in a position of trust must demonstrate

emotional stability. Notwithstanding the eventual outcome of Soroka, the complaint does create an awareness among job applicants, making subsequent efforts to resist and seek redress for similar inquiries by potential employees more likely.

Contrary to some misconceptions, to date, leading publishers of integrity tests have encountered no formal or informal applicant complaints alleging privacy violations, probably because these tests' questions do not typically inquire into such sensitive areas, and are more clearly job related. Moreover, several test publishers continuously conduct follow-up research to ensure that their test items are not perceived as invasive.

Although there are legal and legislative reasons for exercising caution when using preemployment integrity tests, there are also countervailing trends which argue strongly for the more extensive use of such tests. One of these trends includes the expansion of the doctrine of negligent hiring.

The elements of a negligent hiring claim are as follows: First, the plaintiff must demonstrate that the employer owes the plaintiff a duty. For such a duty to arise, there must be an employment relationship between the employer and the party harming the plaintiff, and there must be a sufficient nexus between the employer's business and the plaintiff to create such a duty of care.

Second, the plaintiff must show that the employer breached his duty to plaintiff -- that the employee causing damages was incompetent, and that the employer knew or should have known of this incompetence.

The third element of a negligent hiring claim is that of causation. Here the plaintiff must demonstrate that his injury was caused by the employee's incompetence, as well as that such an injury due to this incompetence was reasonably foreseeable by the employer.

The final element involves the plaintiff showing damage suffered, frequently the easiest element to demonstrate.

Until recently, the negligent hiring cause of action had not been extensively recognized, but now at least 39 states recognize some form of this common law tort.[10] Relevant to psychological testing, plaintiffs have alleged that the employer should have been aware of the characteristics of the employee causing harm. Although no court has specifically stated that psychological testing is necessary to discharge the employer's duty, in many cases such testing would be probative in ascertaining whether an employer has fulfilled his duty.

For instance, in Welsh Manufacturing Division of Textron, Inc. v. Pinkerton's, Inc.[11], the plaintiff brought a negligent hiring suit due to theft committed by a Pinkerton guard. In Welsh, a defendant employer had obtained police records indicating no criminal record, and had contacted two of the

employee's previous supervisors and his high school principal. However, Pinkerton's did not contact the character references listed by the employee.

At trial, plaintiff was awarded over $300,000 in damages. Ultimately on appeal, the Supreme Court of Rhode Island concluded that a trier of fact could reasonably infer that Pinkerton's had breached its duty of reasonable care in hiring the employee. The court also stated, "... mere lack of negative evidence may not be sufficient to discharge the obligation of reasonable care". Thus, an employer may be required to take affirmative steps to evaluate an applicant's honesty. Although the court mentioned the potential use of background checks in discharging the employer's duty, it did not rule out the significance of alternative methods such as integrity testing. Therefore, an employer's position in such suits is likely to be strengthened by psychological testing.

In the future, psychological testing may be even more important from an employer's perspective, given that some courts have been willing to broadly construe the employer's duty. Such a trend is demonstrated by a case in which the judiciary was willing to expand the employer's duty so that liability may extend beyond termination of an employee. In Coath v. Jones[12], plaintiff sued the former employer of a man who had raped her after gaining access to her home. The man had gained such access

based on her mistaken assumption, that he was still in defendant's employ. The assailant had in fact previously been in plaintiff's home while conducting the employer's business.

The court held that in the majority of instances negligent hiring ceases to operate with termination of the employee, "but where the employer has created a special relationship whereby his customers admit his employee into their homes, then the employer may be required to give notice or warning to the customer that the employee is no longer employed." Thus, this holding by the Superior Court of Pennsylvania represents an expansion of an employer's duty in the area of negligent hiring. Moreover, there is no basis to argue that the court's holding is limited to the area of violence. Rather it appears that or equally strong case would have been sustained had the prior employee taken something of value from the plaintiff.

In conclusion, although this paper has not provided an exhaustive survey of all issues, there are numerous legal, ethical and economic reasons for embracing the use of integrity tests, not the least of which is the applicant's right to objective, non-invasive and fair assessment.

References

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4. Blumenthal v. Kay-Bee, No. 8205303

5. Mass. Gen. Laws Ann. ch. 149 §19B(1), (2), (2a), (3), and (4) (West 1985).

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10. Branch, James A., Negligent Hiring Practice Manual (1988).

11. Welsh Mfg. Div. of Pinkerton, Inc. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984).

12. Coath v. Jones, 277 Pa. Super. 479 (1980).